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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

WILLIAM H. SULLIVAN, JR.,
Cross-Petitioner,
v.
NATIONAL FOOTBALL LEAGUE, *et al.*,
Cross-Respondents.

On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF IN OPPOSITION TO CROSS-PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. When one member of a professional football league states no objection to a league policy over a period of many years, actively relies on the policy and supports its validity in order to carry out a financial transaction beneficial to him, and then sues the league and its other members for antitrust damages, claiming that the policy is an unreasonable restraint of trade, did the Court of Appeals err in deciding that a jury may find that the member's "equal involvement" in the policy is a defense to the suit?

2. Did the Court of Appeals err in deciding that, when an antitrust jury is balancing anti- and pro-competitive effects of a challenged restraint, it should not be precluded from considering the restraint's pro-competitive effects in a market related to the market in which the anti-competitive effects allegedly occurred?

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BRIEF IN OPPOSITION TO CROSS-PETITION FOR A WRIT OF CERTIORARI

Despite cross-petitioner's assertion that "there is not a scintilla of evidence" that he "did anything more than acquiesce in [the] continued existence [of the NFL policy he now challenges] up to the mid-1980s" (Cross-Pet. 6), no one bears greater responsibility for the maintenance of the policy than he; and no one is more properly subject to the antitrust "equal involvement" defense than he. Cross-petitioner William H. Sullivan was the only National Football League ("NFL") owner who had personal experience with the circumstance to which the policy is addressed, the only NFL owner who relied expressly on the policy to promote his own personal interests, and the only NFL owner who defended the reasonableness of the policy in sworn testimony in open court in a prior case.

There is no conflict in the circuits on the contours of the "equal involvement" defense, let alone in a case involving these circumstances. Nor does the cross-petition present any issue regarding the balance of pro- and anti-competitive effects on competition that meets the Court's requirements for certiorari.

COUNTERSTATEMENT OF THE CASE

The Statement of the Case in the cross-petition is incomplete and argumentative, and it contains numerous "misstatements of fact," *see* Sup. Ct. R. 15.1.

Statement of Relevant Facts.

The American Football League ("AFL") was formed in 1959 and began play in the 1960 football season. William Sullivan, the cross-petitioner, was the original owner of the AFL Boston Patriots. He financed the start-up of the new venture by taking in partners, who shared the voting ownership, and by selling non-voting stock to the public. (Trial Ex. 2001.)[1]

The AFL adopted many of the policies and procedures then being followed by the established NFL, including those relating to governance of the league and forms of ownership of league members. At the time the AFL was formed, neither league had a formal policy relating to whether member clubs could be publicly owned, although the NFL later developed a policy disfavoring such ownership. (Trial Ex. 5.)

In 1966, representatives of the two leagues had some private discussions about combining them into a single league. The climate appeared favorable, and each league then appointed a three-member committee to represent

[1] All of the trial exhibits referenced herein were included in an Appendix of Trial Exhibits presented to the Court of Appeals for the First Circuit. References to "J.A." refer to the Joint Appendix presented to the Court of Appeals.

its interests in the negotiations that followed. (Trial Ex. 1.) Sullivan was one of the three AFL representatives. After further negotiations, tentative agreements were reached.[2] After Congress approved legislation exempting the consolidation of the two leagues from the antitrust laws,[3] Sullivan and the two other members of the AFL committee executed a written agreement with their NFL counterparts. The agreement was to govern the relationships among all the teams until 1970, the earliest date the consolidated league could be fully implemented. (Trial Ex. 2.)[4]

Among the terms addressed by the committees on which Sullivan served was the policy on public ownership. It was agreed that the NFL's policy would be applied to all new franchises and to all changes of ownership of existing franchises after February 1, 1967. (Trial Ex. 2.) By framing the policy this way, Sullivan was able to maintain the existing public ownership of his club.

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[2] There was a dispute in the trial testimony about the extent to which the chair of the AFL negotiating committee, Lamar Hunt, kept the other two members informed of meetings he had with an NFL representative. Hunt testified that he regularly conferred with and obtained the agreement of the other two AFL committee members—Sullivan and Ralph Wilson—before agreeing to anything on behalf of the AFL. (J.A. 465.) Sullivan testified that he did not know all the details of Hunt's activities (J.A. 509-510), although his son, Charles Sullivan, a former Patriots officer, referred to his father as "the central figure in the negotiating of the merger with the National Football League." (Trial Ex. 1472 at 5-56.)

[3] *See* Pub. L. 90-800, 80 Stat. 1515 (1966); *see also Professional Football League Merger: Hearings on S. 3817 Before the Antitrust Subcomm. of the House Comm. on the Judiciary*, 89th Cong., 2d Sess. (1966) (admitted as Trial Ex. 3).

[4] In the interim, a joint committee, consisting of Sullivan and five others, was appointed to develop the principles under which the consolidated league would operate. The committee met on numerous occasions over several years. (Trial Ex. 1.)

The single league was formed in 1970. On several occasions thereafter, the members reviewed the League's ownership policies. (Trial Exs. 9, 60.) Some were changed. Most, including the public ownership policy, were not. No members, or at most only a few, were interested in making any such change. (*E.g.*, Trial Ex. 224.)

At no time in these discusisons did Sullivan ever object to the public ownership policy or suggest that it be changed. (9/17/93 Tr. at 160.)

In 1976, Sullivan bought out the other voting shareholders of the Patriots, using funds he borrowed on condition that he acquire ownership of the publicly held non-voting shares as well.[5] He accomplished this objective through a "cash freeze-out merger" under Massachusetts law. *See Coggins* v. *New England Patriots Football Club, Inc.*, 492 N.E.2d 1112, 1116 (Mass. 1986). The proxy statement he issued explicitly stated, under "Reasons for the Merger," that the transaction would bring the club, "on a voluntary basis, into compliance with NFL policy which is opposed to public ownership of" member clubs. (Trial Ex. 1233 at 4.) Explaining the word "voluntary," the proxy statement added that "[t]here is no legal obligation on the part of the Patriots to eliminate public ownership and the Patriots do[] not foresee any attempt by the League to require the elimination of public ownership." (*Id.*) The proxy statement reprinted in full a letter from Pete Rozelle, then the Commissioner of the NFL, which Sullivan had asked Rozelle to write. The letter explained that the principal reason for the NFL's public ownership policy is to ensure that club owners are able to make decisions in the best interests of the

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[5] By this time, the team had begun playing its home games in a stadium located several miles outside Boston and had changed its name to the New England Patriots.

League and its product without worrying about the short-term dividend interests of stockholders of member clubs.[6]

Sullivan stoutly embraced the NFL policy and the reasons for it. In the 1976 proxy statement itself, he said:

> In the judgment of the Patriots' Board of Directors, it is becoming increasingly difficult for management to make decisions which will best serve the corporation's objectives if management must attempt to satisfy the often competing responsibilities which it has to public stockholders, on the one hand, and to the League's other twenty-seven member clubs, on the other. (Trial Ex. 1233 at 6.)

Several years later, in a proceeding brought by shareholders who had opposed the 1976 transaction, Sullivan testified under oath that he had a "long-held conviction that what was in the best interests of the league was a more important factor than what was in the best interests of the stockholders, and that had put me in a constant conflict in my own mind." (Trial Ex. 1253 at 5-128.)[7]

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[6] Former Commissioner Rozelle's letter stated specifically:

> The NFL is essentially a joint-venture operation among its clubs directed at the presentation of a form of public entertainment. In furtherance of this common objective, representatives of the member clubs, acting collectively, are regularly required to decide issues of interest to the League at large. That decision-making procedure is impeded if the individuals representing the member clubs are obliged to concern themselves with the immediate dividend interests of their stockholders or are required to consult with or refer back to their boards of directors or to their stockholders decisions affecting overall League interests. Accordingly, the League has an established policy of requiring that control of each NFL franchise be placed in the hands of a single individual having final authority to act for the club on all League matters. (Trial Ex. 1233 at 5.)

[7] In light of the overwhelming evidence as to the purpose of the NFL's public ownership policy, it is not surprising that the First

Despite these repeated reaffirmations of the NFL's policy against public ownership, Sullivan raised the idea of again selling stock in the Patriots to the public. He presented the idea, without prior notice, at a League meeting on October 27, 1987. (Trial Ex. 1001A.) By that time, the club was in dire financial straits, having run up several consecutive years of losses. (Trial Ex. 1615.) Sullivan asserted that because a highly successful professional basketball franchise, the Boston Celtics, had sold a minority interest in the club to the public for a substantial sum, he could do likewise with the Pātriots. He asked, as a favor to him, that the public ownership policy be waived or modified. (Trial Ex. 33A.) At no time did he suggest that the policy was anticompetitive or that it raised any legal question of any kind. After discussion at the meeting, the matter was tabled (with Sullivan's full agreement). (J.A. 1419-24.) It was never raised again, except as one of the topics at a meeting among Patriots officers and League officials a few weeks later that covered several aspects of the club's dismal financial condition. As a result of this latter meeting, Commissioner

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Circuit agreed that the policy enhances the NFL's ability to produce its joint product:

> [W]e accept the NFL's claim that its public ownership policy contributes to the ability of the NFL to function as an effective sports league, and that the NFL's functioning would be impaired if publicly owned teams were permitted, because the short-term dividend interests of a club's shareholder would often conflict with the long-term interests of the league as a whole. That is, the policy avoids a detrimental conflict of interests between team shareholders and the league.

Sullivan v. *National Football League*, 34 F.3d 1091, 1102 (1st Cir.), *petition for cert. filed*, 63 U.S.L.W. 3487 (1994) (No. 94-1048). The Court of Appeals' opinion is reprinted in the Appendix to the Petition for Certiorari filed by the NFL defendants in No. 94-1048 ("Pet. App.") 1a-43a.

The failure of the Court of Appeals to give proper weight to this finding is one basis for the Petition for Certiorari in No. 94-1048.

Rozelle appointed a special committee to help the Patriots find a solution. Eventually, a buyer was found and the club was sold in October 1988. (Trial Ex. 1287.)

Statement of Proceedings.

In 1991, Sullivan brought this antitrust case. He claimed that the NFL policy on public ownership harmed competition in the "market" for ownership interests in NFL franchises and that it lacked any countervailing beneficial effect on competition. He alleged that the League had blocked his effort to sell Patriots stock to the public and that, but for this, he would today be the majority owner of the Patriots, which would be a more valuable franchise. (J.A. 100-07.)

The case was tried to a jury in 1993, which found for Sullivan. After post-trial proceedings, the district court entered judgment for him in the amount of $51 million.

Cross-respondents, who were defendants below, appealed. The Court of Appeals for the First Circuit rejected all arguments that were aimed at the entry of judgment for the defendants, but it did vacate the judgment and order a new trial on five independent grounds. *See* note 9, *infra*.

Sullivan raises two of those grounds here:

1. *Equal involvement.* One of the grounds on which the Court of Appeals ordered a new trial related to the "equal involvement" defense. The NFL defendants had raised this defense in a motion for summary judgment, and they raised it again in a motion for a directed verdict at the close of the plaintiff's evidence at the trial. The district court denied both motions without explanation. (Pet. App. 49a-52a.) In addition, the district court refused to instruct the jury on the defense. The Court of Appeals held that this was prejudicial error requiring re-

versal and a new trial. Citing this Court's decision in *Bateman Eichler, Hill Richards, Inc.* v. *Berner*, 472 U.S. 299 (1985), the Court of Appeals held that

> A plaintiff's "complete, voluntary, and substantially equal participation" in an illegal practice under the antitrust laws precludes recovery for that antitrust violation. . . . In order to establish an "equal involvement" defense, an antitrust defendant must prove, by a preponderance of the evidence, that the plaintiff bears at least substantially equal responsibility for an anticompetitive restriction by creating, approving, maintaining, continually and actively supporting, relying upon, or otherwise utilizing and implementing, that restriction to his or her benefit. (34 F.3d at 1107; Pet. App. 29a-30a.) (citations omitted.)

"In this case," the court concluded, the evidence "is sufficient for a reasonable jury to conclude that Sullivan bears substantially equal responsibility for the NFL's public ownership policy because Sullivan helped adopt the policy, he relied upon it, and he actively supported it." (34 F.3d at 1108; Pet. App. 31a.)

2. *Balancing markets.* A second error the Court of Appeals cited stemmed from the district court's verdict form. The form allowed the jury, if it found that the NFL's public ownership policy harmed competition in the relevant market, to determine as well if the policy provided any benefit to competition and to balance the two effects. However, the court recognized that the verdict form "may have misle[d] the jury into thinking that it was precluded from considering the NFL's justifications for its ownership policy" (34 F.3d at 1113; Pet. App. 41a), which included pro-competitive effects in a broader entertainment market. After reviewing at length the cases on balancing harm and benefit in different markets—including this Court's decision in *National Collegiate Ath-*

letic Ass'n v. *Board of Regents*, 468 U.S. 85 (1984)—the First Circuit concluded that the law at the very least requires the jury to balance harm and benefit in circumstances where the market in which the harm was found was related to the market in which the benefit occurred.[8] (34 F.3d at 1111-13; Pet. App. 37a-41a.)[9]

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[8] The Court of Appeals stated that "to the extent the NFL's policy strengthens and improves the league" the result of the policy may be more "valuable teams," which in turn strengthens "competition in the market for ownership interests in NFL clubs"—the market in which, Sullivan contended, competition was harmed. 34 F.3d at 1113; Pet. App. 41a.

[9] These were only two of the grounds on which the Court of Appeals reversed the district court and ordered a new trial.

Another ground for the new trial ruling was the repeated references by Sullivan's counsel, in front of the jury, to prior antitrust cases that had resulted in verdicts or decisions against the NFL, none of which had any relevance to the reasonableness of the NFL's public ownership policy. The First Circuit described such references as "inherently prejudicial." 34 F.3d at 1113-14; Pet. App. 41a-43a.

Yet another ground on which the First Circuit ordered a new trial was that the district court had deprived the defendants of yet another "key defense" when it refused to instruct the jury on the legal effect of a third party's option to buy the Patriots and excluded evidence of the option-holder's intentions. The Court of Appeals declared that "if Sullivan did not have the legal right to sell Patriots stock to the public, he did not suffer any harm from the NFL's ownership policy and the NFL would have been entitled to judgment in its favor." 34 F.3d at 1110-11; Pet. App. 35a-36a.

Finally, the court held that, in view of the defendants' position that Sullivan simply dropped his public-sale idea on his own, the district court erred by failing to instruct the jury that it had to determine that the plaintiff must prove that the NFL actually enforced its public ownership policy against him. 34 F.3d at 1109-10; Pet. App. 33a-35a.

REASONS TO DENY THE WRIT

Sullivan as cross-petitioner seeks review of the decision of the Court of Appeals on two of the five points the court cited in ordering a new trial in this case.

The cross-petition does not satisfy the standards for certiorari set forth in Sup. Ct. Rule 10.1, as there is no conflict among the circuits or with this Court's decisions on either point, and the cross-petition provides no other reason for the Court to address either point. In any event, no action by this Court in connection with the cross-petition could result in judgment for Sullivan.[10]

I. THERE IS NO CONFLICT AMONG THE CIRCUITS OR WITH THIS COURT'S DECISIONS ON THE "EQUAL INVOLVEMENT" DEFENSE.

The cross-petition contends that the circuits are in conflict with regard to the standard to be applied in evaluating an "equal involvement" defense and that, in any event, the court below misapplied the pertinent decisions of this Court.

That is not correct.

In *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968), this Court rejected the application in antitrust cases of the common-law defense of *in pari delicto*. In a series of concurring opinions in that case, however, "five Justices concluded . . . that where a plaintiff truly bore at least substantially equal responsibility for the violation, a defense based on such fault—whether or not denominated *in pari delicto*—should be recognized in antitrust litigation." *Bateman Eichler, Hill Richards, Inc.* v. *Berner*, 472 U.S. 299, 308-09 (1985).

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[10] In this regard, the cross-petition differs from the petition for certiorari filed by the NFL defendants in No. 94-1048. The NFL's petition, if granted, could result in final judgment for the defendants. *Cf. Virginia Military Institute* v. *United States*, 113 S. Ct. 2431, 2432 (1993) (Scalia, J., concurring in the denial of *certiorari*).

Lower courts, both before and after *Bateman* was decided, generally developed a fairly uniform set of criteria for judging whether an "equal involvement" defense could be made out.[11] Before *Bateman*, the one possible exception was the Ninth Circuit, which, according to the cases cross-petitioner cites, had suggested that the "equal involvement" defense is available "only when the illegal conspiracy would not have been formed but for the plaintiff's participation." *Javelin Corp.* v. *Uniroyal, Inc.*, 546 F.2d 276, 279 (9th Cir. 1976), *cert. denied*, 431 U.S. 938 (1977).[12]

Then this Court decided *Bateman* in 1985 and thereafter *Pinter* v. *Dahl*, 486 U.S. 622 (1988). It is now clear that a plaintiff is barred from recovering damages under regulatory statutes when he has been "an active, voluntary participant in the unlawful activity that is the subject of the suit." *Pinter*, 486 U.S. at 636. The Court in *Pinter* concluded that it is appropriate to "focus[] on

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[11] *See Premier Elec. Constr. Co.* v. *Miller-Davis Co.*, 422 F.2d 1132, 1138 (7th Cir.) (barring recovery where plaintiff bears equal "responsibility for creating and establishing [the] illegal scheme"), *cert. denied*, 400 U.S. 828 (1970); *Columbia Nitrogen Corp. v. Royster Co.*, 451 F.3d 3, 15-16 (4th Cir. 1971) (barring recovery where plaintiffs "mutually participate in the formulation and execution of the scheme and bear equal responsibility for the consequent restrain of trade"); *CVD, Inc.* v. *Raytheon Co.*, 769 F.2d 842, 856 (1st Cir. 1985) (barring recovery for plaintiff's "complete, voluntary, and substantially equal participation in an allegedly illegal scheme"), *cert. denied*, 475 U.S. 1016 (1986); *General Leaseways, Inc.* v. *National Truck Leasing Ass'n*, 830 F.2d 716, 725 (7th Cir. 1987) (barring recovery for plaintiff who bears "a substantially equal responsibility for creating and maintaining the unlawful contract").

[12] *See also Southwest Marine, Inc.* v. *Campbell Indus.*, 732 F.2d 744, 746 (9th Cir.) (declining to apply "but for" test where "truly complete" participation by corporation's officer could not be attributed to plaintiff corporation), *cert. denied*, 469 U.S. 1072 (1984); *THI-Hawaii, Inc.* v. *First Commerce Fin. Corp.*, 627 F.2d 991, 996 (9th Cir. 1980) (finding plaintiff "completely involved in the formation of the allegedly illegal agreement").

the extent to which the plaintiff and the defendant cooperated," not only "in developing" the illegal scheme, but also in "carrying [it] out." 486 U.S. at 637.

The Ninth Circuit has not had occasion to address the "equal involvement" defense since *Bateman* and *Pinter* were decided. Nor has the Ninth Circuit had occasion to address the defense in a factual setting comparable to the situation presented in this case, *i.e.*, a case in which a plaintiff voluntarily—that is, not under any economic or other compulsion—joins an existing association that has an arguably anticompetitive restraint as part of its rules, never protests the restraint either initially or when it is periodically reviewed and reaffirmed, and affirmatively relies on the restraint when it is in his interest to do so. Courts that have addressed this fact pattern since *Bateman* have reached uniform results: The Seventh Circuit has held that in such a situation the defense is established. *General Leaseways, Inc.* v. *National Truck Leasing Ass'n*, 830 F.2d 716 (7th Cir. 1987). The First Circuit, in the present case, held likewise. 34 F.3d at 1107-09; Pet. App. 29a-33a.[13] Moreover, as noted above, *Pinter* establishes beyond doubt that not only "developing" but also "carrying out" the restraint is germane to the analysis. 486 U.S. at 637. Thus, the decision below was plainly correct on this point.[14]

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[13] *See also Chicago Professional Sports Ltd. Partnership* v. *National Basketball Ass'n*, No. 90-C-6247 (N.D. Ill.) (transcript of proceedings, January 23, 1992) (denying damages recovery to Chicago Bulls because it had acquiesced and participated in the restraint it was then challenging).

[14] Sullivan cannot, as he suggests, evade the "equal involvement" issue by "withdrawing" from the alleged conspiracy at the last minute. Even if one could conclude that Sullivan ever withdrew from the alleged conspiracy, he did so—at the earliest—in October 1987, when the public ownership policy first became personally inconvenient for him. Such a last-minute withdrawal is insufficient under equal involvement and general conspiracy principles. *See General Leaseways*, 830 F.2d at 723 (plaintiff's equal participation was not minimized by the fact that he "opposed the nonaffiliation

There is no conflict between the First (and Seventh) Circuit's approach and the approach of any other Circuit on this point. Now that this Court has decided both *Bateman* and *Pinter*, there is no basis to think that the Ninth Circuit would adhere to its previous position that a plaintiff is barred only when he was a crucial factor in the *formation* of the restraint. *See* 34 F.3d at 1108 n.8 ("There is no evidence of such a rigid 'but for' requirement in the Supreme Court's formulation of the equal involvement defense in *Bateman*"). If the Ninth Circuit ever adheres to its previous formulation of the defense, that will be the time for this Court to resolve whatever conflict is then perceived to exist. There is no reason for the Court at this time to review the "equal involvement" defense.

Moreover, the only effect this Court could have on this case by granting the cross-petition would be to influence the instructions to be given to the jury in the event the new trial ordered by the Court of Appeals goes forward.[15]

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rule only when *he* was restrained by it") (emphasis in original); *United States* v. *Herron*, 825 F.2d 50, 59 (5th Cir. 1987) (last-minute withdrawal from conspiracy "does not prevent a conspiracy conviction of the withdrawing party").

[15] Contrary to Sullivan's argument, adoption of the "but for" formulation would not dispose of the case in his favor. As noted, Sullivan was on the AFL committee that negotiated the single-league agreement in 1966 and was able to exclude his own club's public ownership from the policy, and he was a member of the Joint Committee that developed the rules and policies under which the new, single league would operate. (Trial Exs. 1-2.) He never suggested that the public ownership policy was inappropriate, let alone unlawful. The equal involvement defense is unavailable as a matter of law only when the plaintiff is "a party who has vigorously protested the inclusion of an illegal provision only to be overwhelmed by a party in a superior bargaining position." *THI-Hawaii, Inc.* v. *First Commerce Fin. Corp.*, 627 F.2d 991, 996 (9th Cir. 1980); *see also CVD, Inc.* v. *Raytheon Co.*, 769 F.2d 842, 856 (1st Cir. 1985) (plaintiff not barred because he was "overwhelmed by a party in a superior bargaining position"), *cert. denied*, 475 U.S. 1016 (1986). As the First Circuit stated in this case, "the [district]

Therefore, this is not in any event an appropriate case for the exercise of this Court's certiorari jurisdiction. *See Black* v. *Cutter Laboratories, Inc.*, 351 U.S. 292, 297 (1956) ("This Court . . . reviews judgments, not statements in opinions.").

II. THERE IS NO REASON FOR THE COURT TO ADDRESS THE MARKET BALANCING ISSUE.

Sullivan makes no claim in his cross-petition that the decision below conflicts with any decision of this Court or of any other circuit with respect to the balancing of pro- and anti-competitive effects of a challenged restraint. The decision below was unquestionably correct, and the cross-petition does not assert otherwise. Instead, Sullivan simply suggests that this is an issue on which the Court should "clarify the law."

The cross-petition, however, offers nothing to "clarify." All of the cases on this issue hold that pro-competitive effects in one market may be balanced against anti-competitive effects in a different market. *See National Collegiate Athletic Ass'n* v. *Board of Regents*, 468 U.S. 85, 117-18 (1984) (weighing beneficial effect on competition among "amateur athletic teams" against alleged injury to competition in market for live college football telecasts); *Los Angeles Memorial Coliseum Comm'n* v. *NFL*, 726 F.2d 1381, 1399 (9th Cir.) ("the jury was not constrained to ascertain the reasonableness of [the challenged conduct] solely in view of the internal NFL market"), *cert. denied*, 469 U.S. 990 (1984); *McNeil* v. *NFL*, 1992-2 Trade Cas. (CCH) ¶ 69,982, at 68,772 (D. Minn. 1992) (permitting jury to consider benefits in market for "NFL football product" generally although injury to competition was allegedly in the market for player

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court's view that the NFL imposed the ownership policy on the AFL owners, rendering their participation involuntary, is largely unsupported by the record." 34 F.3d at 1109; Pet. App. 32a. Plainly, Sullivan would not have been entitled to a directed verdict on this issue even if the "but for" test were followed.

services).[16] *See also National Football League* v. *North American Soccer League*, 459 U.S. 1074, 1076-79 (1982) (Rehnquist, J., dissenting from the denial of *certiorari*) (considering benefits to cross-ownership policy in general "entertainment" market although competition allegedly harmed in a different market); *accord* VII P. Areeda, ANTITRUST LAW ¶ 1502 at 372 (1986); ANTITRUST LAW DEVELOPMENTS (THIRD) 53 (A.B.A. Section on Antitrust Law 1992).

The Court of Appeals in this case took a very cautious approach. It held that the NFL's pro-competitive arguments would, if accepted, strengthen the value of NFL franchises, which would in turn be relevant to a market that relates to the market in which the NFL public ownership policy allegedly harms competition. In these circumstances, the court held—as has every other court that decided the issue—that benefit in one market may be balanced against harm in a different market. (34 F.3d at 1112-13; Pet. App. 40a-41a.)

The arguments Sullivan offers, therefore, provide no basis for this Court to address the law on this point. In any event, there is not even a suggestion that this Court could reach a decision that would result in the entry of judgment in Sullivan's favor.

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[16] The two additional cases Sullivan cites did not decide this issue. *See Smith* v. *Pro Football, Inc.*, 593 F.2d 1173, 1186-89 (D.C. Cir. 1978) (rejecting argument that "competitive balance" was a pro-competitive effect that had to be considered at all and thus never reaching the different-markets point); *Brown* v. *Pro Football, Inc.*, 1992-1 Trade Cas. (CCH) ¶ 69,747 at 67,405, *recons. denied*, 812 F. Supp. 237, 238-39 (D.D.C. 1992) (following *Smith*), *appeal pending*, No. 93-7165 (D.C. Cir.).

CONCLUSION

The Cross-Petition for a Writ of Certiorari should be denied.

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